No. 85-1317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. TUCKER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ROBERT S. ATKINS
ROBERT S. ATKINS & ASSOCIATES, INC.
200 North LaSalle Street
Chicago, Illinois 60601
(312) 346-3100

ROBERT E. BENNETT
120 South LaSalle Street
Chicago, Illinois 60603
(312) 236-3309

ROBERT L. TUCKER, Pro Se
208 South LaSalle Street
Chicago, Illinois 60604
(312) 332-2088

JOHN C. TUCKER*
2 Colony Trail
Lanexa, Virginia 23089
(804) 966-5048

WILLIAM J. HARTE*
WILLIAM J. HARTE, LTD.
111 West Washington Street
Chicago, Illinois 60602
(312) 726-5015

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

The three questions presented for review appear at pages i through vii of the Petition for a Writ of Certiorari filed on February 3, 1986.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I.

PREJUDICIAL SECRET EX PARTE COMMUNICATIONS BY THE PROSECUTION TO THE CHAMBERS OF THE TRIAL JUDGE

Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, all but concedes the government's embarrassment.

The so-called "in camera . . . information supplied by a confidential source, James Gunnelles," was not the only matter secretly submitted by the prosecution to the trial judge. (Justice Department Letter, Pet. App. A3-4).

And the use of the term "in camera" in this instance again masks the truth of what actually transpired in the trial court, namely, the secret and on going transmittal by the prosecutors, without the knowledge of, or any notice to the defense of plainly scurrilous, disparaging, prejudicial, baseless, and admittedly uncorroborated accusations of the commission by this Petitioner of other crimes, along with other adverse and prejudicial information pertaining to Petitioner, prior to and continually during the course of the trial.

Moreover, prejudicial pretrial submissions to chambers were consciously made at the time when the judge had under consideration rulings on critical pretrial defense motions, all of which were summarily denied by the trial court after reading and reviewing the secretly submitted materials complained of.

Contrary to the government's assertions there was nothing remotely, nor even pretextually, exculpatory about any of the materials so submitted.

Nor is it factually correct, as stated in the footnote at page 3 of the government's Brief in Opposition, that "after sentencing, the government disclosed or described the remaining documents that had been submitted in camera . . ."

Although this set of rather strange and

peculiar circumstances was called to the attention of the Circuit Court, as well as this Court, the sixteen months concealment of the complete facts of these prejudicial submissions to the trial judge's chambers, is yet to be explained, defended or even addressed by anyone at any government level, including the Office of the Solicitor General.

The issue raised on this point is not "whether we trust our judges" as stated by the Solicitor General and the Circuit Court, but the obvious adverse, negative and unfair implications arising from the apparent "practice" or "strategy" of the government in assasinating a defendant's character through the use of derogatory, prejudicial, and admittedly uncorroborated information, on the pretext paradoxically of obtaining Brady v. Maryland determinations, with only

the judge, the prosecutor and possibly a special agent of the FBI knowing about it.

The truth is the complete information as to these damaging submissions came to the attention of this Petitioner only through the persistence of Petitioner's appellate attorneys on or about May 10, 1984. The jury's verdict had been returned and judgment entered thereon six months earlier on January 13, 1983. Petitioner's trial counsel had unsuccessfully sought this information prior to sentencing. (See Tr. Feb. 24, 1983, pp. 26-34).

No case has been cited by the government, and no case has come to the attention of petitioner or his attorneys, that in any way mandates or approves the improper and plainly prejudicial conduct and ex parte communications engaged in by the prosecution in this case.

II.

DUE PROCESS AND HARMLESS ERROR

The case against petitioner turned solely upon the credibility of Pheterson, the author of the two page letter that was erroneously excluded by the trial court. Pheterson, himself, designated the communication "Part 1" (Pet. App. C-1), and "Part 2" (Pet. App. C-6); opening "Part 2", addressing the prosecutor, with the statement: "I have read your version of our talks and have answered you partially in part 1. I now feel I must make additional comments." The two parts are but one continuing document.

Reversal is particularly mandated in light of the unequivocal findings of the appeals panel on this question:

> ". . . [A]part from Pheterson's testimony the evidence fell far short of

proving Tucker's participation in the fraud . . ." (Pet. App. B-6).

". . . [T]he jury was entitled to consider the letter as evidence that, as the defendants argued, Pheterson was an unreliable witness . . ." (Pet. App. B-6).

In light of the foregoing determinations, there can be no principled justification for holding that the exclusion of the "rambling" "weird" two part Pheterson letter from the jury during its deliberations was "harmless". U.S. v. Marrero, 486 F.2d 622, 627 (7th Cir. 1973).

III.

RACIALLY MOTIVATED PEREMPTORY EXCLUSION OF BLACK PROSPECTIVE JURORS FROM THE TRIAL

Respondent denies the existence of any constitutional conflict, warranting this Court's resolution, between the result in this case and the decision of the U.S. Court

of Appeals for the 7th Circuit in United States ex rel. Teague v. Lane, 779 F.2d 1332 (7th Cir. 1985 - Rehearing En Banc granted one month after the denial of same to this Petitioner, Cudahy, J. dissenting, Pet. App. D-1), or the result reached by the U.S. Court of Appeals in this case, and the decisions in McCray v. Abrams, 750 F.2d 1113 (2nd Cir. 1984), and Booker v. Jabe (No. 83-1136) (6th Cir. October 29, 1985).

While what happened here is apparent to any lay person, petitioner produced Dr. Hans Zeisel, a world-renowned authority on jury selection, who concluded "There can be no doubt that the prosecution went out of its way to eliminate all black prospective jurors from the trial. The government's response to Professor Zeisel has always been simply to ignore him.

The Court can be assured that there

will always be a nonracial "explanation" for striking this or that non-white prospective trial juror, and some certainly will be genuine, rational and valid. But, is it either rational or reasonable if one desires to obtain "an educated jury, with business experience," that all the black potential jurors be stricken? Every one of them? While equally "uneducated" white jurors were accepted!!

The issue here is simple. Do citizens, responding to their community's call for jury service, and persons who stand before the bar of justice accused in both state and federal courts realize the constitutional demands of Due Process and fair and impartial trial, free of the odium of rejection of persons from the judicial process on the basis of their race?

This Court has examined, and now has

under advisement, that vital issue in a plethora of state court cases. Batson v. Kentucky, U.S. Supreme Court No. 84-6263, pending. Petitioner accordingly prays that this Court accept this case, thus removing any doubt as to what the law and the procedure for applying it shall be in the federal judicial system.

Respectfully submitted,

ROBERT S. ATKINS
ROBERT S. ATKINS &
ASSOCIATES, INC.
200 North LaSalle St.
Chicago, IL 60602
(312) 346-3100

ROBERT E. BENNETT
120 South LaSalle St.
Chicago, IL 60603
(312) 236-3309

ROBERT L. TUCKER, Pro Se
208 S. LaSalle St.
Chicago, IL 60604
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JOHN C. TUCKER*
2 Colony Trail
Lanexa, VA 23089
(804) 966-5048

WILLIAM J. HARTE*
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LTD.
111 W. Washington
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